IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

MONDAY, THE 15TH JANUARY 2007 / 25TH PAUSHA 1928

FAO.No. 162 of 2004()

AS.275/1998 OF ADDL.SUB COURT,KOTTAYAM
OS.421/1993 OF MUNSIF COURT, KANJIRAPPALLY

.....

APPELLANT: RESPONDENT/PLAINTIFF

ALEY P.JOHN, W/O.JOSEPH,
KARUVELIL HOUSE, KANAKAPPALAM KARA,
ERUMELI SOUTH VILLAGE.

BY ADV. SRI.J.S.AJITHKUMAR
SRI.SERGI JOSEPH THOMAS

RESPONDENTS: APPELLANTS/DEFENDANTS

---

1. VALSAMMA SAMUEL, TEACHER,
   7TH DAY ADVENTIST, ENGLISH MEDIUM SCHOOL,
   THIRUVILLUAMALA VILLAGE, THRISSUR DISTRICT.

2. SANTHAMMA SAMUEL, NURSE, GOVT. HOSPITAL,
   MOUNT ABUKARA, NIRCHI DISTRICT, RAJASTHAN,
   REPRESENTED BY POWER OF ATTORNEY HOLDER
   YOHANNAN SAMUEL, AGED 82, MANJATHANATTU HOUSE,
   KANAKAPPALAM KARA, ERUMELI SOUTH VILLAGE.

3. ELIZABETH SAMUEL, MANJATHANATHU
   HOUSE, KANAKAPPALAM KARA, ERUMELI SOUTH
   VILLAGE.

BY ADV. SRI.M.NARENDRA KUMAR

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON 15/01/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

FAO 162/2004

ORDER ON I.A.NO.2123/2004 IN F.A.O.NO. 162/2004

DISMISSED.

Sd/-

15.1.2007 K.T.SANKARAN, JUDGE

/TRUE COPY/

P.A. TO JUDGE

K.T.SANKARAN, J

F.A.O. No.162 of 2004

Dated this the 15th day of January, 2007

JUDGMENT

The plaintiff in O.S.No.421/1993 on the file of the Munsiff's Court, Kanjirappally challenges the order of remand made by the Additional Sub Court, Kottayam in A.S.No.275/1998.

2. The suit is for declaration of title and recovery of possession and for consequential injunction. The plaintiff contended that the plaint A schedule item no. 1 having an extent of 83 cents and other properties including the property in the possession of the defendants were partitioned as per Ext. A1 partition deed of the year 1124 M.E. As per the partition deed, 'C' schedule therein was allotted to the first defendant who is the brother of the plaintiff. D schedule in Ext. A1 partition deed was allotted to the plaintiff. The case of the plaintiff is that an extent of 13 cents out of the property allotted to her under Ext. A1 partition deed was encroached upon by the first defendant. The trespassed portion is shown as item No.2 in the A schedule of the plaint. Item No. 2 of the plaint A schedule is sought to be

recovered from the defendants. On the contention raised by the first defendant, defendants 2 and 3 were impleaded as additional defendants. Subsequently, the first defendant died.

3. The contention of the defendants is that the properties are not being possessed as per Ext. A1 partition deed and the properties shown as C and D schedule in the partition deed were not acquired by the father of the plaintiff and the first defendant. The property belonging to the plaintiff is Areekka Parambu Purayidam and that possessed by the defendant is Manjathani Purayidam. These properties were acquired under different title deeds and that they are being occupied by the parties as per the title deeds. The case of trespass was denied in the written statement filed by defendants 2 and 3. It was contended that if at all the plaintiff has title to the plaint schedule property, the same has been lost by adverse possession and limitation.

4. Before the trial court, the plaintiff was examined as PW1 and Exts. A1 and A2 were marked. The commissioner who submitted Ext. C1 plan and C2 report, was examined as PW2. Though Ext. B1 was marked on the side of the defendants, no

oral evidence was adduced by the defendants.

5. The trial court decreed the suit. The trial court held that the commissioner has demarcated the plaint schedule items 1 and 2 and that the plaintiff has title to the plaint schedule properties. It was held that the parties are governed by Ext. A1 partition deed. As regards the plea of adverse possession and limitation, the trial court held that the defendants did not adduce any evidence to substantiate their contention in this regard. The defendants filed appeal before the lower appellate court challenging the judgment and decree of the trial court and the appellate court remanded the case to the trial court for fresh disposal.

6. The substantial questions of law arising for consideration in this FAO are:

(i) Whether the lower appellate court was justified in remanding the case to the trial court affording an opportunity to the defendants to adduce evidence when the defendants failed to adduce evidence in spite of sufficient opportunity being available to them to adduce evidence?

(ii) Was the court below justified in effacing the commissioner's report and plan completely when the facts and circumstances do not warrant the same and if at all only a remittal of the commissioner's report is sufficient?

7. The appellate court considered the evidence adduced by PW2, the commissioner, and held that the commissioner has not measured plaint A schedule item No. 1. The commissioner has only demarcated plaint item No.2 marking the extent of the plaint item No.2 on the western side of the property in the possession of the plaintiff. In short, the appellate court accepted the contention raised by the defendants that there was no measurement of the plaint A schedule item No.1 in the possession of the plaintiff and that the only measurement and demarcation was in respect of the portion which is claimed as plaint item No.2. This finding is not fully correct. The commissioner has stated in the report that he has measured the property. The cross examination of PW2 by the defendants would also indicate that the commissioner has measured the property. The suggestion to PW2 is that the plaint item No. 2 is

demarcated in the plan in order to make up the total extent in addition to the property possessed by the plaintiff. If that be so, it presupposes that the property in the possession of the plaintiff was measured by the commissioner. The commissioner could not give proper answers to various questions put to him in the cross examination. The records do not reveal that the commissioner was given sufficient opportunity to refresh his memory. The commissioner stated in answer to many questions that only the surveyor knows those details. Though objections were filed to the commissioner's report by the contesting defendants, there is no contention that the commissioner is either biased or that he did not consider the facts and details put forward by the defendants. The lower appellate court, on the finding that the commissioner has not done the work properly, set aside the commissioner's report and plan. After hearing the counsel for the parties and after perusing the commissioner's report, plan and evidence, I am of the view that it is not necessary at all to set aside the commissioner's report and plan. On the other hand, to elucidate the matters in controversy and to

bring on record the relevant facts to enable the court to completely and effectually adjudicate upon the disputes involved in the case, it is only just and proper to remit the commissioner's plan and report to the very same commissioner for completing the work. The commissioner shall measure the plaint schedule properties and C and D schedules in Exhibit A1 partition deed and demarcate the same in the plan. All the relevant facts shall be stated in the report.

8. At the same time, I do not find any justification to interfere with the finding of the lower appellate court that a remand to the trial court is necessary to consider the question of title on the basis of the identification of the property and demarcation of plaint schedule items 1 and 2.

9. The learned counsel for the appellant contended that there is no proper pleading to found the case of the adverse possession. He also submitted that the suit is of the year 1993 and the trial court disposed of the suit only in September 1998. Enough opportunity was available to the defendants to adduce evidence but they deliberately did not adduce any oral evidence

or other documentary evidence to support their plea of adverse possession. Counsel submitted that an opportunity to adduce evidence, that too on a plea of adverse possession, should not be allowed in favour of the defendants, as is now done by the appellate court to fill up the lacuna and to have a second innings in the case. It is true that the learned counsel for the appellant is justified in submitting that an opportunity should not be granted to the defendants to adduce evidence in support of their plea of adverse possession. I would have fully agreed with the counsel but for the fact that a remand is necessary on other grounds. The matter having been remanded and that remand is upheld on other points, I do not think that it is just and proper to debar the defendants from adducing evidence in support of their contentions including the plea of adverse possession and limitation. At the same time, affording such an opportunity should not be without any condition. The plaintiff is the sister of the first defendant. Defendants 2 and 3 are the children of the first defendant. It is stated that the plaintiff is aged 93. At this advanced age, she is compelled to fight a litigation with her

brothers' children when the latter did not care to co-operate with the trial court by adducing proper evidence.

10. In the facts and circumstances of the case, I am of the view that the defendants should be made liable to pay a sum of Rs.5,000/- as cost to the appellant/plaintiff as a condition for remand. The defendants shall deposit a sum of Rs.5,000/- before the lower appellate court within a period of six weeks from today. If they fail to deposit the costs as aforesaid they will be precluded from adducing any evidence in support of their plea of adverse possession and limitation.

11. In the result, the FAO is disposed of in the following manner:

(i) the remand made by the lower appellate court is upheld.

(ii) the finding of the lower appellate court that the commissioner's report and plan are liable to be set aside, being not proper, is hereby set aside. At the same time, the report and plan submitted by the commissioner shall stand remitted to the same commissioner for inspection of the

property and for reporting the matters mentioned in this judgment and in the judgment of the lower appellate court. If the same commissioner is not available, the trial court would be free to appoint another commissioner for doing the work.

(iii) the remand made by the trial court to enable the defendants to adduce evidence in support of their plea of adverse possession and limitation will be subject to the condition that the defendants shall deposit before the lower appellate court for payment to the plaintiff a sum of Rs.5,000/- within a period of six weeks from today. If the sum of Rs.5,000/- is not deposited as aforesaid, the defendants will be precluded from adducing any evidence or putting forward any contention in support of their plea of adverse possession.

(iv) the trial court shall dispose of the suit as expeditiously as possible taking into account the age of the plaintiff. The commissioner is hereby directed to complete the inspection and file the report within the shortest

possible time. The trial court shall ensure that the services of the surveyors or village officer shall be made available for the assistance of the commissioner without any delay.

(v). The trial court shall consider the plea of adverse possession and limitation based on the pleadings as are now available. The parties shall appear before the trial court on 19.2.2007.

K.T.SANKARAN,
JUDGE

csl